[Begin block quote]
Official Transcript of the American Military Tribunal in the matter of the United States of America, against Otto Ohlendorf, et al, defendants, sitting at Nurnberg, Germany, on 6 October 1947, 0930-1630, Justice Musmanno, presiding.
[end block quote]

THE MARSHALL: The Honorable, the Judges of Military Tribunal No. II-A.

Military Tribunal No. II-A is now in session. God save the United States of America and this Honorable Tribunal.

There will be order in the court.

THE PRESIDENT: For the purpose of the record, it will be noted that Otto Rasch and Eduard Strauch, because of illness, are not present in Court and will be excused from today's session.

Last Tuesday afternoon, just before we recessed from this courtroom and reconvened in Courtroom No. 1, Dr. Gawlik, I think, made an object-tion [sic] to the showing of a motion picture exhibit, which was about to be projected in Courtroom No. 1. We overruled the objection, because by the very nature of things, it was impossible for the Tribunal to know just what the exhibit consisted of. We did witness the motion picture and we are now convinced that the objection was in order and would have been sustained. It was not apparent to the Tribunal how this motion picture exhibit in any way implicated individually any of the defendants. Therefore, the objection is now sustained and the motion picture will have no effect upon the disposition of this case.

I might add, personally, that I could not in any way use that exhibit in the disposition of this case, because I closed my eyes after the first five minutes.

Dr. Aschenauer, you may now proceed with the opening statement.

Mr. President! High Tribunal!

After submission of the documents on the part of the Prosecution in the Case of the United States versus Ohlendorf, et al, it will be the task of the Defense to make their comments concerning the documents themselves. The Defense will be able to point out errors, to make clear to the Tribunal points which are contradictions in themselves, thus destroying in some cases the value the documents possess as

evidence, as well as reducing the value of the entire evidence brought forth by the Prosecution. However, all this does not alter the fact that executions took place. It is therefore the duty of the Defense to discuss how this gruesome drama in the East came to pass.

The men accused here before this Tribunal admit in the majority that they committed

I. The acts with which they are charged

a) in presumed self-defense on behalf of a third party(so-called act for the presumed protection of third parties (Putativnothilfe) is the established technical term of the German legal language).

b) under conditions of presumed emergency to act for the rescue of a third party from immediate, otherwise unavoidable danger (so-called [sic] "Putativnotstand" according to German manner of speaking). This defense is legally of importance as there exist no national legal code and no national penal system in which the exonerating reasons advanced by the defendants do not carry some weight. How these rea-sons [sic] are designated in the terminology of the individual national penal systems is irrelevant; irrelevant is also, for the time being, to what extent these reasons constitute exemption from punishment or extenuating circumstances, whether they can be regarded as eliminating the prerequisite of unlawfulness, as eliminating the prerequisite of guilt, or as extenuating circumstances; essential at the moment is only the very general assertion that these reasons may influence "whether" and "how" to punish and must therefore be examined.

An examination of the relevance of these reasons, however, is only possible when the legal principles have been clearly established according to which the conditions and consequences of the reasons for exoneration from guilt or instigation of punishment are to be judged. This point must be cleared up first.

1) The so-called General Regulations of Law No. 10

There is no criminal code which would restrict itself merely to laying down the constituent elements of a crims [sic]. On the contrary, every

national penal code contains a great number of regulations which determine the general conditions which make an act a punishable offense, conditions which are fundamental ly [sic] common to all crimes, be this in the form of a definite decree, be it in the form of a common law brought into a system by decisions of trial courts or by publications of members of the legal profession. Into this group fall among others the regulations pertaining to causality, intent and negligence, attemptsand [sic] preparatory acts, perpetration itself, and mere participa-tion [sic], soundness of mind and age limit, periods of limitation, further, which is of importance for the following, the regulations concerning self-defense, including presumed self-defense (Putativnotwehr) and the regulations concerning acts committed for the protection of other persons in danger, including the cases where this danger is only pre-sumed [sic].

None of this applies to Law No. 10. Apart from instituting by im-plication [sic] the principle "nulla poena sine lege poenali praevia" to the negative, it merely contains regulations stipulating the non-limitation [sic] of certain acts, the legal irrelevance of the fact that the acts were committed by responsible officials and the instigating fact that the acts were committed upon orders. Other regulations which normally form part of the "General Regulations" of every penal code are not contained in the law.

There can be no doubt (and on the occasion of actual cases the Military Tribunals themselves made statements to this effect) that the silence of Law No. 10 is not to be interpreted in such a way as if the reasons, circumstances and conditions which make an act a punish-able [sic] offense or exclude punishment should have no bearing. There is no question of that. Circumstances such as the regulations concerning soundness of mind, age limit as far as guilt is concerned, self-defense [sic] and acts committed under the pressure of emergency, etc. regard-less [sic] of whether they are ruled by written law or by common law, are

simply indispensable. The question is merely which sources are to be drawn upon for the problems not settled by Law No. 10.

If Law No. 10 were a so-called special national law, it would be very simple to answer this question. One would only have to fall back on the general regulations of the Penal Code of that country which enacted this law, just as the so-called penal by-laws of the German law forge "General Regulations" of their own and refer to the corresp-onding [sic] general regulations of the German Penal Code. However, Law No. 10 is barred from the use of this possibility. The reason is that this law, owing to its origin, is an international agreement, made by the four signatory powers for the detailed implementation of the Moscow Declaration of 30 October 1943 and the London Declaration of 8 August 1945. However, this agreement was made by four sovereign powers of equal rights, each of which had its own penal system. Thus it is impossible simply to use the pertinent regulations of the Code Penal, the Soviet Penal Code 1926, the English or American Penal Law as "General Regulations" of Law No. 10.

2) Which legal system is to form the basis of the "General Regulations" of Law No. 10?

Here the following fundamental possibilities exist:

a) Applicable is the law of that state which administers justice in the actual case. In the case at hand the Tribunal would therefore have to draw upon the general regulations of the penal law of the United States of America to fill the gaps of Law No. 10.

This solution would have one undeniable advantage: namely, an exact knowledge of the applicable laws on the part of the Tribunal which will make the decision. On the other hand, these advantages are outweighed by considerable disadvantages. There is, first of all, the question whether Federal Penal Law or the penal law of one single state would be applicable. As the latterpossibility [sic] is excluded, the gaps of Law No. 10 would have to be filled by the Federal Penal Law of the USA. To

judge acts under the pressure of emergency and in self-defense in accordance with the Federal Penal Law of the USA, however, calls forth the same doubts as those which speak against the supplementary use of the Anglo-American legal system when judging European continental legal conditions.
The doctrine of these legal systems on the rules governing acts of self-defense [sic] and acts committed in a state of emergency, rules developed by Case Law, would be so alien to European legal thought, that it is bound to produce misleading results if applied to the conduct of the Defendant. According to American law, the scope of the rules governing acts of self-defense is extremely narrow, if compared with the European concept; the principles of the rules governing acts committed in assumed self defense are not even elucidated. Similar to English law, self-defense [sic] forms part of the constituent elements of a crime and, there-fore [sic], does not carry the same comprehensive and fundamental importance as it has in European law. Therefore, the closing of gaps left in Law No. 10 with American statutory or common law, would no doubt violate the predominant principle that an act can only be completely judged if presented in its social and legal context; it would not be in conformi-ty [sic] with the principle of material justice, as postulated in Law N6o. 10, if principles alien to the German and European concept of law were applied in considering legally relevant varieties of conduct, such as acting in emergency or in presumed emergency, acting in self-defense or in presumed self-defense.

Finally there is another very important reason which speaks against the supplementary application of the legal code of the nation by which the Court is formed in the case. The evaluation of the Defendant's actions would differ – and this would have effects contrary to just punishment – if each Court were to fall back on its own national law. For in that case it would be unavoidable that the interpretation of the concept of mental sanity, by e.g. a French court should differ from the one, say,

of an English Court. The result would be that, given identical cases – the difference in age limits would also have to be considered – one Defendant would have to be acquitted, while the other would have to be sentenced, because he happened to be handed over to a Court of a different Allied nation. The supplementary application of the LEX FORI does not therefore lead to a satisfactory solution.

b) The national law of the defendant should be applied. In order to close the gaps left in Law No. 10 in the field of general regula-tions [sic], the general part of the German Criminal Code would therefore have to be applied in case this doctrine is followed.

In common with the rest, this solution has the disadvantage that the Court is A PRIORI not familiar with that law. This, however, is outweighed by considerable advantages. The general part of the German Penal Code is (as are the Austrian, Swiss, and Russian Laws) a charac-teristic [sic] representative of the European legal system with its tendency to lay down firm, and at the same time general rules, especially in respect to acts committed in a state of emergency and in self-defense. Furthermore, that law could in fact, and not only in hypothesis, be considered the guiding principle for the conduct of the Defendant. The Defendants are also psychologically forced to admit the validity of these law statutes against themselves to their full extent; they do not have the excuse that they are being judged according to "foreign penal law". Finally also International Law speaks in favor of applying German Criminal Law in a supplementary fashion; for, as the Defendants committed their acts in occupied enemy territory, these acts have to be considered according to a theory popular on the Continent of Europe, as committed within the borders of Germany within the meaning of the Criminal Code.

c) The law of the place of the crime should be applied. As the offense of the Defendants is "geographically defined" within the mean-ing [sic] of the Moscow Declaration of 30 October 1943, that law can easily

be ascertained; in the case under review, it is the Penal Code of the Soviet Union (Penal Codes of the Russian Soviet Federal Socialist Republic of 1926, of the Ukrainian Republic of 1927 and any Special All-Union Laws). The following considerations speak in favor of the supplementary application of that law. Firstly, according to the Moscow Declaration of 30 Oct. 1943, (which according to Article I forms an integral part of Law No. 10) the law of the place of the crime (Law LOCI) rules the adjudication of crimes which can be geo-graphically [sic] defined; the perpetrators "will be sent back to the countries in which their abominable deeds were done in order that they may be punished according to the laws of these liberated coun-tries [sic]". Furthermore, the applicability of the LEX LOCI is explicitly stressed in the indictment itself; this must, naturally, be true not only for the arguments of the Prosecution, but also for any exonerat-ing [sic] or justifying circumstances. Finally the application of the LAW LOCI also conforms to the idea of justice.

d) Finally: the law of the victim State should be applied – in this case again, the Penal Code of the Soviet Union. The facts which favor the principle stated in c) also apply here. That theory is further supported from the point of view of legal systems, by the principle of punishing acts committed in a certain country according to the laws of that country and for the protection of that country, a principle recognized in International Penal Law; it is supported, from the point of view of territorial applicability, by the fact that above all other solutions, it stills the justifiable desire for retribution on the part of the primarily injured state. The following will show that in the first place the Soviet Penal Law and, failing that, the German Penal Law, should be used to supplement "general regulations" in order to close the gaps in Law No. 10 and that this solution is preferable by far to any other possibility.

That choice brings with it another very important advantage. For the

problems under discussion in the present case, namely evaluation of acts of self-defense and acts of emergency, the two legal systems show striking similarities, as both are exponents of the characteris-tic [sic] European concept of Penal Law, with its tendency to systematic generalization and adversity towards Case Law. This can be easily explained on historical grounds. For the Penal Code of the Russian Soviet Federal Socialist Republic of 1926 is largely based on the old Russian Penal Code of 1903; the latter's origin, however, was decisively influenced by the German doctrine prevalent in about 1900. When we compare the German and Soviet rules governing acts of self-defense and acts committed in an emergency, we can arrive at that "cross-section", that "average rule", a result unobtainable by compar-ing [sic] the Continental European and the Anglo-Saxon Penal Laws, owing to the difference between these tw
o legal systems. A Court called on to decide a specified case is only then able fully to evaluate the arguments of a defendant, if their evaluation is based on the so-called European "cross-section" of the rules governing acts of self-defense and acts committed in an emergency. The rules have to be discussed in the following, and the arguments brought forward for the defendant have to be judged according to these rules.

The legal prerequisites of an act committed in a presumed emergency and in presumed self-defense, according to European legal conceptions. The prerequisites of these two legal concepts first have to be examined separately, according to German and according to Soviet Law; subsequently it has to be ascertained which prerequisites are common to both legal systems; the result will form the above-mentioned "cross-section", on which the actual evaluation of the defendant's actions has to be based.

I. Self-Defense

1) According to German Law.

a) Self-defense is considered (Article 53 of the Penal Code) a so-

called justification; where self-defense is established there can be no question of an act being unlawful; the act is not only excused but even approved by the law. The prerequisite for self-defense is an unlawful attack, i.e., an attack which the attacked person does not have to tolerate. The attack need not yet have started. Self-defense is also admissible in the face of an imminently threatening attack. Acts in defense of all protected interests come under self-defense which is not limited to acts in protection of life and limb. There-fore [sic] also the state as such, the existence of a nation, the endanger-ed [sic] vital interests of a nation, can be defended in self-defense. The protected interests are thus much more numerous than in Anglo-Saxon Law.

b) Not only the person attacked, but any third person, is allowed to act in self-defense. This is important, particularly with respect to the so-called self-defense on behalf of the State. For self-defense [sic] in favor of the State always constitutes an act for the protection of a third party, can therefore only be carried out by a third person. No comparison in the value of the protected interests is being drawn in the case of self-defense, neither does it exist, therefore, in the case of defense of the State. The only measure for the defensive action always is the intensity of the attack.

c) Presumed self-defense and acts for the presumed protection of a third party. Although these concepts are not formulated in the law, they are generally recognized in theory and jurisdiction. They exist where the perpetrator erroneously presumed an "unlawful attack". If the error was unavoidable, the presumed state of self-defense serves as justification; if, however, the error could have been avoided, the legal importance of such self-defense is contested; according to one opinion, the defendant cannot be sentenced for having acted with intent; while according to another less widespread opinion it constitu-ted [sic] a factor mitigating the guilt, while accountability for intent

remains. According to both opinions, it is, however, impossible to hold the Defendant responsible to the full extent for this criminal guilt, if, owing to a factual error, he believed his act to be justified.

2. According to Soviet Law.

a) According to Soviet Law (Art. 13, par, 1 of the Penal Code of the Russian Societ [sic] Federal Socialist Republic and the other Republics of the Union of the year 1926) the concept of self-defense conforms essentially to the German concept. Self-defense can apply to the State too, and particularly to the Soviet organization as such. In contrast to German law, the Soviet law even states VERBIS EXPRESSIS that self-defense [sic]may be also exercised in favor of the State (compare for details Maurach, Systematic Treatise on the RUSSIAN PENAL LAW of 1928, p. 101). As in the German law, there is no provision for fixed proportions between the clashing interests. It is not clarified in professional publications whether an act committed in aid of a third person constitutes justification or only an excuse.

b) Presumed self-defense and acts for the presumed protection of a third person. As in the German law, this is not laid down by law, but is recognized in jurisdiction and literature. It is treated in the same manner as a factual error. It excludes intent, the guilt is at least considered as mitigated; it is immaterial whether or not the error was avoidable.

II. State of Emergency
1) According to German Law

The regulations concerning the state of emergency (Notstand) found in the existing laws are insufficient, not codified and given for individual cases and situations. The fundamental decisionof [sic] the Reich Supreme Court clarified the position. According to this the following applies:

a) A distinction is made between a state of emergency as justifica-

tion for an act and a state of emergency merely precluding guilt. A fact common to both is that an interest protected by law must be in imminent danger, which danger can only be averted by the violation of another interest protected by the law, having no connection with the first one. If the threatened interest is found to be of greater value, then the state of emergency constitutes grounds for justification; if the interests cannot be weighed and if there is a threat of danger of life or limb of the perpetrator or a relative then the state of emergency constitutes a reason precluding guilt.

b) National Emergency is in principle recognized within the same limits as assistance to the State in case of emergency (Staatsnothilfe). According to the decision of the Reich SupremeCourt [sic] of 3 April 1922 File II, 791122, a situation of acute danger is constituted particularly by"underground [sic] activities of resisting elements of the population of an area and the increasing insecurity of that area resulting therefrom". Furthermore, the Reich Supreme Court has in Vo. 60, 318, recognized the so-called permanent state of emergency and has stated that the permanent danger which a particular person present to the community could, in certain circumstances, justify his elimination by killing as an act of emergency. The question of whether national emergency allows the killing of a man was, on the other hand, left open by the Reich Supreme Court. The question has been widely discussed, especially in the period following the first war, but was never definitely decided.

c. Presumed state of emergency. The law gives no definite rul-ing [sic] on this, but it is recognized according to common law in doctrine and jurisprudence. In principle it is treated in the same way as presumed self-defense.

2. According to Soviet law: More modern than German law, Soviet Penal Law gives, in Section 13, paragraph 2 of the Criminal Code, a ruling on the state of emergency. It has thus achieved the aim for which the German reform legislation has been striving for a long time. Acts of emergency are unrestrictedly admissible if they are necessary for the protection of higher interests insofar as the danger could not be averted by any other means. Whether this constitutes a justi-fication [sic] or merely a legal excuse is not clear. There is no legal ruling on a presumed state of emergency but it is treated as an error and thus comes in the same category as presumed self-defense.

3. Results of comparison of both legal systems. If the elements common to both legal systems are examined, a wide similarity will be found in the conceptions of these legal terms:

a. Self-defense. All protected interests may be the subject of self-defense, particularly the survival of the state and the vital interests of the nation represented by the state. If the existence of the state or of the nation is directly threatened, any citizen –and not only those appointed for this purpose by the state – may act for their protection. The extent of the self-defense or of the act for the protection of the third party (Nothilfe) varies according to the severity of the attack and does not exclude killing. An error concern-ing [sic] the prerequisites of self-defense or of an act for the protection of a third party is to be treated as an error about facts and constitutes, according to the avoidability and also the degree of gravity of the individual error, a legal excuse or, at the very least, a mitigating circumstance.

b. State of emergency. In accordance to both legal systems, a state of emergency is always of a subsidiary character – thus it is a

so-called last resort. All legal interests can be in a state of emergency, especially also the state and its institutions as well as the welfare of the nation. A state of emergency is recognized where the threatened legal interest is of considerably greater value than the interest attacked by the perpetrator. A presumed state of emergency is, on principle, treated as a grave error – that is, it is treated in the same manner as presumed self-defense.

Sub-sumption of a concrete case under established prerequisites of a legal clause. On the basis of the examination of the European "cross-section" of the legal position assumed by the defendant Ohlen-dorf [sic], it must be established to what extent the actual circumstances under which the defendant acted correspond to the prerequisites of a criminal case as described above. Before, however, reference must be made to the method to be applied.

The defendants, and in particular Ohlendorf, do not claim that the real conditions were given for a case of action in defense of the endangered nation (Staatsnothilfe) or participation in the self-defense of the state (Staatsnotwehr). But they do submit that in view of the special situation in which they found themselves and in which they were called upon to act, they assumed that the conditions were given for the above-mentioned legal concepts. There is no need to examine the questions whether there actually existed a situation calling for an act of self-defense or of emergency.

Nevertheless, we must not overlook the examination which follows and which discusses the objective conditions for an act of self-defense and in a state of emergency. Such an examination is necessary in order to find out where, precisely, the defendant Ohlendorf committed the error concerning the permissibility of his action; because the greater the extent to which the objective situation corresponded to the defendant's conception, the weightier his defense that by mistake he considered his action justified or necessary.

After this introduction, and on the basis of the defendant's

statement, the examination may be arranged according to the following points of view:

1. Objective conditions, i. e., conditions which existed not merely in the defendant's mind but were actual facts: the nature of the war against the Soviet Union.

2. Subjective conditions, i. e., conditions which were not actual facts, the assumption of which could, however have brought about the defendant's error about what would constitute the conditions for actions in defense of the endangered nation or in a state of national emergency; the East European Jewish problem as part of the problem of Bolshevism; origin and import of the defendant's obsession that a solution of the problem – Bolshevism versus Europe - could only be brought about by a "solution" of the Jewish problem, and, in their particular sphere, only by unreserved execution of the Fuehrer order.

For the classification of these objective and subjective condi-tions [sic], - that is, the question of the cause for the above-mentioned obsession, I call upon the expert witness Professor Dr. Reinhart Maurach.

In addition, it need not be stressed that a state of war as such does not justify extraordinary actions prohibited by written and common international law from the point of view of self-defense, and a state of emergeny [sic].

War in itself does not provide the legal excuses of self-defense or state of emergency. But a preliminary condition is that there is really war in the strict sense of international law, an armed clash between two states; but if the armed clash has from the outset an aspect considerably exceeding the measure of war and its limits, if, in other words, the war aims and war methods to be definitely expected from one of the opponents are so "total" that, in relation to them, the tradi-

tional conceptions and limits of international law cannot be applied, it will not be possible to refuse resort to self-defense and to a state of emergency – even within the war – to the opponent of such a state.

It must, therefore, be examined whether the Soviet Union can be given the qualification of such an enemy – proper enemy in the sense of international law. The character of the Soviet Union as a state, and consequently, as a potential belligerent can, it is true, not be denied. But the question is whether the Soviet Union, according to her own ideology and to the ideas which are its basis, has not to be considered as such a belligerent who, considering the war aims and methods of the Soviet Union, puts the presumptive adversary ipso facto into the position of war self-defense admissible in international law.

II. In addition, the defendants refer to the orders given and the state of emergency caused by these orders. As to this question Dr. Gawlik is going to give detailed explanations. Concerning this problem of superior orders contested by the statute here, and by Law No. 10 of the Control Council, I only want to give some quotations of passages from English – not German, works:

Professor Oppenheim has stated in his book, "The Law of Nations":

"Violations of the rules of warfare are war crimes only if they are committed without order of the belligerent government in ques-tion [sic]. If members of the armed forces commit such violations by order of their governments, such violations are no war crimes and cannot be punished by the opponent; the latter can, however, take reprisals. If members of armed forces are ordered by their military commanders to commit violations – the members cannot be punished – for the commanders alone are responsible and the latter can, therefore, be punished as war criminals after being captured by the enemy."

The American specialist in international law, George Manner, writes in the article, "The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War":

"The principle that members of the armed forces of a country

are not personally responsible and can, therefore not be punished for acts contrary to the rules of warfare and committed by them by order, or with approval, of their governmental or military superiors, is not part of the codified law on warfare. Nevertheless, this seems to be a recognized principle of this law, at least, this principle has been drawn up in the war manuals of the powers as a rule of the common law on warfare since 1914."

Article 347 of the American Rules of Land Warfare, drawn up under the supervision of the Judge Advocate General published by the U. S. War Department in 1940, and today still in force, states – after enumerating the possible war crimes:

"Individuals of the armed forces are not to be punished for these war crimes if the latter were committed by order, or with the approval, of their government or commanders. The superiors who order-ed [sic] such acts or under whose authority such acts were committed by their troops, can be punished by the belligerents in whose hands they fall."

The same point of view was maintained until 1944 by the competent British authorities in the British Manual of Military Law. Its Article 443 went on, after enumerating possible war crimes:

"It is, however, important to note that members of the armed forces who commit such violations of the recognized rules of warfare that have been ordered by their governments or commanders are not war crimes and can, therefore not be punished by the enemy. He can punish the officials or commanders responsible for such orders if they fall into his hands, otherwise he can only take the other measures dealt with in this chapter."

Professor Lauterpacht writes, in this respect, in his essay published in the English Year Book for International Law 1944:

"Although Chapter XIV of the Military Manual was not given statutory powers it contains, in general, a statement of the rules of written and common international law as they are understood by Great Britain."

To show the High Tribunal how difficult the position of each man was to disobey the order of the Fuehrer, if [sic] is necessary to illustrate the situation in its historical development by a written expert opinion.

III. When Fieldmarshal Keitel defended himself and the OKW at the trial before the IMT, he tried to convey a picture of the distrib-ution [sic] of power in the National Socialist regime, according to which the SS represented the will which governed the state – whereas the Wehrmacht and its leaders were in a state of unqualified subjection to this "fact".

In reality, however, if we want to evaluate the relations of the Wehrmacht and any leading institutions and supreme representatives of the State and Party, we must always remain conscious of the fact that the Wehrmacht enjoyed at all times a privileged position which was unique.

Only this can explain that the State Police, which as such claimed a central position in a comprehensive sphere of activities, was at the beginning of the war excluded from the Wehrmacht and from the occupied territories under the command of the Wehrmacht. (Example: The first groups of the Chief of the Security Police and of the SD (Security Service) marched into France camouflaged and under a false designation.) It was only before the Russian campaign that an agree-ment [sic] was concluded, after difficult negotiations, which regulated the tasks of the State Police and of the SD <u>outside the troops.</u>

At the end of May 1941 the negotiations took place between the High Command of the Army and the Chief of the Security Police and of the SD which led to a written agreement which was signed by Quarter-master [sic] General, General Wagner, and by the then Chief of the Security Police and of the SD, Heydrich. Schellenberg kept the minutes. The agreement contained the basic order of the Fuehrer, that the Security of the fighting troops must be guaranteed by all means and that units of the Security Police and of the SD must be employed in support of the

Army units. The Chief of the Security Police and of the SD was given immediate authority to issue pertinent instructions to these units and an independent channel for receiving and transmitting reports which was outside the jurisdiction of the Wehrmacht. These units by no means formed a special "political theater of operations" but they were attached to the Army units – this was laid down in the second part of the agreement – and generally had to carry out tasks for the Army units themselves. The second part contained an exact regulation of commands and subordinations. "In the Front or combat areas the Einsatzkommandos of the SIPO and of the SD were in all tactical and service questions – that is completely – put under the command of the Army." In the operational areas they were under the command of the Army as far as service matters were concerned; orders resulting from tactical consider-ations [sic] had precedence over all other orders. If it was required by the military situation, the Einsatzgruppen and Einsatzkommandos could be used for military tasks regardless of other orders. The third part of the agreement explained the concepts "tactical" and "service".

In accordance with this agreement and the "Barbarossa-Order" to the Army units, which was based on it, mobile units designated "Einsatzgruppen" and "Einsatzkommandos" were attached to the Army Groups and Armies in the East. Army Group North got Einsatzgruppe A. Army Group Center got Einsatzgruppe B, and Army Group South got Einsatzgruppen C and D. (Einsatzgruppe D was originally intended to serve with an Army Group which was to operate in the Caucasus.) In spite of the intended official designation of the leaders of these units as "Representative of the Chief of the Security Police and of the SD with the commander of the Rear Area of Army Group……, Einsatzgruppe …..", what happened in practice was that at once, at the beginning of the Eastern campaign whole Einsatzgruppen or the larger part of such groups were attached to Armies by order of the Army Group in question. Einsatzgruppe D was, from the first day and for the entire period

which is of importance for this trial, attached only to the 11th Army and had no connection with the Commander of the Rear Area of the Army.

While Einsatzgruppen A and 13 had to allocate two detachments (Kommandos) each to the Commanders of the Rear Area of the Army and to three individual Armies, the detachments (Kommandos) of Einsatzgruppe C were at the disposal of the Armies only. That the Commanding Generals of Armies themselves attached great value to having the detach-ments [sic] in their operational area is proved by the subsequent altera-tion [sic] of the order for Sonderkommando 4a. This Kommando was assigned to the Commander of the Rear Area of the Army, but was attached to the 6th Army on the personal order of Field Marshal von Reichenau.

For "Marches" and "Rations" the Einsatzgruppe was subordinate to the Command Headquarters, which means that the Army units were competent for

1. Determining the location of the staff of the Einsatzgruppen and of the Kommandos, which included fixing the strength of the staffs and kommandos as well as the length of time to be spent in one location.

2 Billeting.

3. Rations including PX goods.

4. Gasoline.

5. Repair of motor vehicles and spare parts.

6. Ammunition.

7. Maps.

8. Field post.

9. Telecommunications.

From the contents of the agreement and from the way it was carried out in practice in the East we may form the following picture of the actual and.legal [sic] situation, which is typical for the manner in which orders were given:

1. The Einsatzgruppen and their subordinate units were fully motorized mobile units which were militarily equipped and organized.

Members of the State Police, of the Criminal Police, of the DS and units of the Ordnungspolizei and of the Waffen-SS were assigned to the Einsatzgruppen.

In this composition the Einsatzgruppen were unique phenomena. They were thus units composed of a minority of specialists of the Security Police and of the SD and of units of the Ordnungspolizei and of the Waffen-SS. This unit was at the disposal of the Repre-sentative [sic] of the Chief of the Sipo and of the SD for his tasks in the operational area of the Command headquarters, to which he was attach-ed [sic]. The special position of the Einsatzgruppen and Einsatzkommandos manifested itself also in the fact that they were not called Ein-satzgruppen [sic] and Einsatzkommandos of the Sipo and of the SD, but simply Einsatzgruppe A to D, or Kommandos 1 to 12. Their primary task being of the kind normally handled by the Security Police and by the SD, the Einsatzgruppen and Einsatzkommandos were led by leaders of the Sipo or of the SD who were especially assigned this task.

2. The Representatives of the Chief of the Sipo and of the SD with the Army groups and with the Armies were attached to the Commanding Generals and subordinate to them in the functions which were most important for their work.

3. As regards technical instructions the powers of command of the Commanding Generals and of the Chiefs of the Security Police and of the SD were not clearly separated. The question had been deliberately left open and left to practice. But it was certain – and expressly mentioned in the Barbarossa order – that every order of the Army Group or of the Army, "for reasons of operational necessity" had precedence over the orders of the Chief of the Sipo and of the SD. Whenever it was necessary in the military situation, the Army units could on their own responsibility and at their own discretion make the Einsatzgruppen and the subunits subordinate to themselves for military tasks.

Incidentally, the actual legal situation follows from the Reich

Defense Law of 4 September 1938. In Article 2 we read: "Once an oper-ational [sic] area has been determined, the declaration of the state of defense confers on the Commander-in-Chief of the Army and the Commanding Generals of Armies without special order the right to exercise executive power in this operational area. This right to give orders has precedence over instructions given by other superior agencies…

Concerning, "competencies to issue orders in the operational area of the Army: the OKW moreover issued an order on 11 April 1940 which states under No. 3 with reference to the Reich Defense Law: "…in their exercise of executive powers the Commanders-in-Chief of the Army and the Commanding Generals of the Armies are entitled to issue directives, to set up special courts and to issue instructions to the authorities and agencies in charge of the operational area, with the exception of the highest authorities of the Reich, the highest author-ities [sic] of the Prussian State and Reichsleigung of the NSDAP. This right to issue instructions has precedence over instructions of other superior agencies."

The later development of this general situation as created by law and by an order of the LKW shows, that the right of issuing instruction to the higher SS-and Police Chief and the SS-and Police units under his command is gradually more firmly established. Thus on 7 September 1943 the OKW issued a "service instruction for the higher SS-and Police Chief in Greece", in which it is laid down among other things: "The Higher SS-and Police Chief is an agency of the Reich Fuehrer-SS and Chief of the German Police, which for the duration of its service Greece is under the command of the Military Commander Greece"….. The Higher SS-and Police Chief receives directives and instructions for the field of activity assigned to him from the Reich Fuehrer-SS and Chief of the German Police and carries them out independently while making current and punctual reports to the Military Commander Greece, as far as he gets no restricting orders from the latter. The Military Commander must be informed in time of the reports submitted by the

Higher SS-and Police Chief to the Reich Fuehrer-SS and Chief of the German Police".

Furthermore, the Military Commander Serbia also classes Jews and gypsies prima facie as elements of insecurity in accordance with the order of the Fuehrer at the beginning of the Russian campaign.

Concerning the entire activity of the Einsatzgruppen, it is to be noted that it was carried on under the jurisdiction of the Command-ing [sic] Generals to whom these groups were attached. Therefore, in all tasks, including these which belonged in a stricter sense to the Security Police and the SD, this jurisdiction had to be respected, which means that these tasks could be carried out only with the express will or with the tacit consent of the commanding generals. This applies especially to the commanding general's capacity as supreme judicial authority for the population in his area of jurisdiction. It is true that the use made by the commanding generals of this capacity varied considerably in their dealings with the Einsatzgruppen and Einsatzkom-mandos [sic]; in certain areas the organs of the Army invariably gave their consent to all executive acts affecting the population. In other operational areas the fact that the command authorities occasionally interferred [sic] in pending proceedings or gave orders for special measures concerning the population, showed that the commanding generals were not only conscious of their superior jurisdiction and position, but also made use of it.

It is with deep regret that we clarify these points. For the Defense, however, they are of great importance with respect to the possibility of disobeying given orders. The leaders of the Einsatz-gruppen [sic] and Kommandos were executive officers with instructions. Their authority as to decisions started only with the very execution of their orders. For them there was no real possibility at all to prohibit the execution of orders themselves. Actually, there was merely the theoretical possibility for the Army Commanders to examine at their discretion – an account of their authority and their task concerning

the security of their operational area, on account of their responsibility for safeguarding the front-line operations – the question of whether the actual killing of the people selected endangered their tasks. If they had come to this conclusion they would have been authorized to give instructions to prohibit liquidations. Likewise it is clear that, again theoretically, only intervention of the Commanders-in-Chief with the Fuehrer was possible.

From this relation of the Einsatzgruppen to the Army groups, the Defense is going to prove: 1.) the continuous close cooperation of the Army groups with the Ein-satzgruppen [sic] and Kommandos. Orders of the Army Commanders to secure objectives, to carry out inspections, etc., and also other military tasks, e.g. investigations concerning anti-partisan measures, recruit-ment [sic] of Tartars for front-line service, will show the close connection between the Commanding General and Einsatzgruppe or Kommandos.

Finally, evidence will be submitted for the following:

The Commanding Generals held executive power and were, consequently, also Supreme Military Judiciary authorities (Oberste Gerichtsherren) for their areas, i.e., they made decisions affecting liberty, life and death. That they were conscious of this fact in relation to the civilian population is clearly shown by individual facts already mentioned or still to be mentioned.

The orders leading to executive actions and to the executions mentioned by the Prosecution were known to the responsible Commanding Generals. Written or oral reports were given in many cases about such executions by Einsatzgruppen and Kommandos to the Commanding Generals.

Commanding Generals and officers of the Army supported such executions, or took part in them, or gave special orders in individual cases.

Army units themselves carried out such executions.

IV. The prosecution has charged the defendants not only with crimes against humanity and with war crimes but also with membership in an organization that has been declared criminal.

Under Count 3, Mr. Ferencz stated:

"The judgment of the International Military Tribunal established the fact that the SS, the Gestapo, and the SD are criminal organizations." In reaching its decision, the Tribunal made frequent reference to the acts of the Einsatzgruppen. In the face of this, the Defense will dem-onstrate [sic] the following:

As aresult [sic] of the completely false and misleading use of the term "SD", even by official authorities of the NSDAF [sic] and of the State, by all military authorities up to Adolf Hitler himself, a completely false conception as to the actual meaning of "SD" arose among wide circles of the German people, especially during this war, above all, however, abroad, and especially among the occupation authorities.

The error is based on the fact that the term "SD" had the two following meanings:

A. It is the term for a special news service organization, which collected, evaluated, and submitted reports to the appropriate authorities of the State and of the Party. This news organization which did not have any executive police powers either before or during the war, exercised its functions within the SS, that is within the Party, its members were employees of the Party and were paid by the latter, just as in general, the entire budget was met not by the State but by the Party, that is, the Reich Treasurer.

THE PRESIDENT: May I interrupt, please, If you say that Hitler himself mis-used the term SD ---

DR. ASCHENAUER: I would like Your Honor to repeat what he said. The system was out of order.

THE PRESIDENT: Y es [sic]. I understood you to say that Hitler himself misused the term "SD"?

DR. ASCHENAUER: Yes, that is so.

THE PRESIDENT: If that is so, won't we then run into many complications as to the meaning of this term, because the Tribunal has been led to believe, and, with the Tribunal the rest of the world, that Hitler's word was law in Germany. Therefore, if he used the term "SD" in any particular way, wouldn't that of itself then make his meaning official?

DR ASCHENAUER: No, Your Honor. This is not a matter of the general mis-use, it just occurs in one particular decree in a sentence which was used here.

THE PRESIDENT: It would appear to me that from what we understand of Hitler's power, that if he called the SD a "PQ" that then it became "PQ" from that moment on.

DR ASCHENAUER: I don't think I have understood what Your Honor meant.

THE PRESIDENT: Whatever Hitler said was law, and if he used the term "SD" in any way opposed to your definition of "SD", Hitler's definition would be law, would it not?

MR ASCHENAUER: No, Your Honor. That I quoted it here is one certain decree, which is erroneous, a mistake which has been made once, and all the other decrees which are being offered to the Tribunal, and submitted to them, who that what is said in this one sentence is a mistake.

THE PRESIDENT: Very well, it was for purpose of clarification that I had asked it. (interruption) Will you please repeat Dr. Aschenauer, it seems that it got into the wrong channel.

DR ASCHENAUER: The error is based on the fact that the term "SD" had the following meanings:

A. It is the term for a special news service organization which collected, evaluated, and submitted reports to the appropriate authorities of the State and of the Party. This news organization which did not have any executive police powers either before or during the war, exercised its functions within the SS, that is, within the Party;

its members were employees of the Party, and were paid by the latter, just as in general, the entire budget was met not by the State but by the Party, that is, the Reich Treasurer. If, therefore, the SD is re-ferred [sic] to as an organization with a special assignment, that is an organization with certain tasks, only the above-mentioned news organiza-tion [sic], with its clearly delineated duties, its installations and its personnel carrying out this task can and should be meant. Any other duty, or the assumption of a function is a false implication.

B. All wearers of the SS uniform with the SD marking on their left jacket sleeve were also characterized as "SD". From the beginning of the war, the SS uniform with the SD marking was worn by almost all of the members of the Secret State Police (Gestapo) including the Border Police, Criminal Investigation Police, and especially all members of the Stapo and Kripe on combat assignment, were [sic] SS uniforms with the SD insignia. It is, therefore, easily understandable that everybody considered all men wearing this uniform to be "SD". Another result was that this term was not only applied to all those wearing those uniforms with the SD insignia but also to the organizations to which these men belonged. These were the SD offices in the a ctual [sic] sense of the word and the offices of the State Police and Criminal Police. For the sake of convenience and the desire for simplification and abbreviation, all of them were now called "SD". Thus the Wehrmacht, when dealing in enemy country with "commanders of the Security Police and of the SD" and with "Commanding Officers of the Security Police and of the SD"—that is what these agencies were officially called --, referred to them briefly merely as the "SD" only, for all members of these organizations wore the SD insignia. Thus the French or the Norwegians referred briefly to these organizations and their personnel, all of whom wore the SD insignia, as SD only, and usually they meant the State or Criminal Police. Actually, how could he [sic] know that the "Commander of the Security Police and of the SD" was an organizational term that could be traced back to the "Chief of the Security Police and

SD," that even in these organizations there existed not always an SD news service set-up, or that in such organizations there were actually three completely independent and separate organizations included:

1. A news organization of the Party or of the SS, that is the SD in the real meaning of the word, as the organization with a special news service function.

2. Two authorities of the State Executive, that is of the Police (Stapo and Kripe), which in their special duties and activities, stood on an equal feeting [sic] completely independent one of the other, and were merely held together by purely organizational ties and by the fact that the same individual held a leading position in both, (In this con-nection [sic], see enclosed sketch.)

This mistake in the designation of the organizations and of the mutually shared uniform (SD) finally went so far that even the Fuhrer in his "Commando Order" of 18 October 1942, ordered that the arrested commando troops be given over to the "SD" even though, in this instance, beyond all doubt, he meant the police executive, the State Police. It would not have occurred to any office in the Wehrmacht or the German Police to deliver members of an enemy commando, if they were arrested in the Reich, to an SD sector, for everyone knew that this was exclusively the concern of the State Police.

Now what brought it about that all members of the Stapo and the Kripe wore this uniform and this SD insignia, even though they had nothing to do with the actual SD news service itself, as far as their duties were concerned? The answer to this requires a brief description of the development.

The "SD" as a news service originated in 1932, when HIMMLER commissioned HEYDRICH, a former naval officer, with the establishment of a news service, in order to combine uniformly the local "political information service" (P.I.) which had here and there arisen due to political necessity. This P. I. had the task of gathering information about the other political parties, their plans, and aims, in order to be able to

utilize it in the struggle against the other parties.

After the assumption of power in 1933, this task was extended to include the gathering of information about all opponents of National Socialism, their organizations and their activities. The actual hour of birth of the SD, however was in 1934 when a few old National Social-ists [sic] who came from all circles of the movement and were thus clearly not recruited from the ranks of the SS alone, recognized the following to be true: The old parties of all shades of opinion, together or [sic] banned by the state. Any additional activity by these organizations is illegal and is therefore to be dealt with by the police, and the police is therefore authorized to fight, together with the Information Service, against such illegal opponents. This in itself proves that from the very beginning the SD (Security Service) was not at any time given such executive powers which rested exclusively with the police organs of the State. (Even at that time the SD was mainly engaged in the research and study of ideological contrasts and on their effects on National Socialism.)
Furthermore, they relized [sic] that
A. Gradually, ever since 1922, all public criticism in parliaments, press and radio had been abolished.
B. There was a growing tendency to misuse the Fuehrer principle and to push through orders, permitting no criticism.
C. There existed the common tendency always to stress to higher auth-orities [sic] only the positive aspect of one's own field of activities, but to conceal in a shamefaced manner all unfavorable developments, mistaken measures, danger points, etc.

Thus in the course of time the Reich administrators could gain only a completely distorted picture of the development and situation in the individual vital spheres (Levensgebieten) (Law, administration, ed-ucation [sic], economy, etc.) They could no longer have a clear perception of the resulting reaction among the public and professional circles concerned. From this they concluded that an authoritarian state, by its every [sic] nature,

needed an organization which would be willing and capable of present-ing [sic] to responsible central agencies an objective and undisguised picture of the general position and developments without having any adminis-trative [sic] responsibility itself. In 1934/1935, this task was assumed by the SD without explicit orders to that effect from any party or govern-ment [sic] authority, therefore, illegally. (For the authorization and legitimation of the SD as sole permissible news service of the NSDAP covered only the collection and transmission of news relating to counter-reforms [sic], their efforts and aims.) This explains why in 1934/1935 this part of the SD at the SD Main Office in Berlin consisted of a mere hand-ful [sic] of men. Easter, 1935, for example, it consisted of a man who also worked as legal and administrative expert, 4 or 5 younger jurists, who had not finished their professional training and only worked part-time at the SD in addition to their other work, and 3 or 4 assistants.

In addition to this completely inadequate staff, there was a com-plete [sic] lack of agencies in the country and the necessity to build up this news service for vital spheres in a more or less illegal manner, be-cause [sic] every reference to it caused sharp protests by the Party and above all by government authorities against this type of work. It was regarded by all these people as an inadmissible encroachment upon their own jurisdiction. Thus, for example, until 1936, the time when Ohlendorf entered the SD, the entire field of economy had hardly been dealt with. Only after that were systematic efforts made to win suitable specialists who were able to handle the individual vital spheres (Lebensgebietsarbeit) in an expert manner. At this juncture, it may already be said that from this work in purely vital spheres done by the Zentralabteilung II/2 the Amt III was subsequently developed under OHLENDORF, this is today considered the SD in the proper sense.

1936 was a year of particular importance, because Himmler became "Chief of the German Police" with the official designation "Reich Fuehrer SS and Chief of the German Police at the Reich Ministry of the Interior" in the process of another governmental reform and the centralization

of the police which had hitherto been under the direction of the Laender. Under him were Daluege as "Chief of Police and Heydrich as "Chief of the Security Police" Thereby, Heydrich simultaneously held a post in the administration of the SD as News service of the Party and of the entire German Security Police. This two-fold function explains the subsequent title of "Chief of the Security Police and SD" from which derives the designation "Commander" (or in command) (Befehlshaber) bzw. Kommandeure) of the Security Police and the SD in the occupied territories. whereas until 1936 probably only a few members of the police, mainly the State Police, belonged to the SS, partly to the SD and partly to the General SS [sic] Himmler, from 1936 on, endeavored to have the SS take over the whole police organization. Thus from 1936 to 1939 many members of the police force who were eligible for the SS, were taken over into the SS, starting with the State Police and Criminal Police. Heydrich brought it about that the transferred members of the Stapo and Kripe began to wear SS uniforms. They wore the SD insignia on the left sleeve, although they were never in any way connected with the SD as news service and as organization for a special task but remained, as hitherto, members of the state executive. Neither common service nor esprit de corps tied them to the SD. The uniform clothing of the Stapo and the SD, the distribution of which was started at that time, gave the uninitiated the first cause to designate en bloc as SS, member of two organizations of totally different fields of activity-work of a news service for vital spheres and executive work of the Security Police – merely becuase [sic] of their uniform outer appearance – that is to say the SD uniform with the SD insignia. This misleading collective name led to the habit of calling SD men not only the members of both organizations but of designating the offices and field of activity of both institutions simply as "SD". In fact, 90 per-cent [sic] of the people wearing SD uniforms had nothing to do with the actual work of the SD news organization. On the other hand, the SD of the RFSS, purely as news service, was not connected with the state executive

(State Police and Criminal Police), either by subject matter or by its duties. In spite of this fact, it was also called SD in common usage and especially also during the war in official announcements, decrees and orders (see Hitler's commande [sic] order). (Besides, in the NS-State there were numerous such 'personal unions' (one person being the holder of two or more jobs) as for instance in the person of Goering, the Minister President of Prussia, Reich Minister for Air, Supreme Commander of the Luftwaffe, Plenipotentiary for the Four Year Plan, Reich Chief for Hunting, etc. Nobody would dream of it to call all this one organization on account of the 'Personalunion'.)

Thus from 1936 onwards there resulted the organization as re-produced [sic]. There we see two completely different organizational and actual spheres of office – one of them the Party, the other the State. But the men working these two completely independent and different set-ups are wearing the same uniform: The SS0-uniform with SD. These were the first decisive causes for the above-mentioned com-plete [sic] confusion.

It is almost to be called a marvel that these two organizations, the Party news service and the State Police were, on account of wearing the same uniform, mistakenly looked upon as one uniform entity, where-as [sic] from the very beginning they also showed very relevant actual differences among each other. These differences were the cause that already in 1937/38 some spheres of work were completely taken away from the SD (Iii) and were handed over to the Secret State Police Office, namely Communism and Marxism. The 1938 decree concerning the division of functions (Funktiens-Trennungs-Erlass) already made it quite clear that the SD had nothing whatsoever to do with the comprehensive intelligence service in enemy territory. These differences were ultimately settled when, urged by the State Police in 1938, another reorganization was effected, the result of which was the establishment of the "Reichssicherheitshauptant [sic]" (Reich Main Security Office.) Thus it was ultimately made clear that the dealing with the enemy in its

entirety as far as intelligence service and actions resulting from it were concerned, belonged to the competence of the Secret State Police, that is to say, Amt IV of the RSHA. This reorganization terminated the former Zentralabteilung II/1 (Central department) (Enemy research) ("Gegnerforschung") in the framework of the SD as a news service organi-zation [sic], and that from that time onwards the SD's exclusive sphere of work was that of a mere news service organization, exclusively occupying it-self [sic] with "Lebensgebietsarbeit" (matters concerning vital spheres). The former Zentralabteilung II/2 (Lebensgebiete) became the AMT III of the RSHA, and its employees were branded as members of a criminal organization in the IMT verdict. The SD, however, which organization was declared to be a criminal one, is according to its development the leading Zentralabteilung II/2 (Lebensgebiete), which at no time has had any contacts whatsoever with the tasks and the activities of the State Police (Stapo).

As from September 1939 the following set-up was given:

The Reichssicherheitshauptamt (Reich Main Security Office) (RSHA) CONSISTS OF 7 – seven – Aemter:

Amt I: Organization and Personnel

Amt II: Administration and Economy

Amt III: SD – Home Front (Lebensgebiete)

Amt IV: Secret State Police

Amt V: Criminal

Amt VI: SD-Ausland (Foreign News Service)

Amt VII: Scientific Research

From now on AMT I comprises the organizational and personnel problems of the Sipe (Stapo and Kripe) (State Police and Criminal Police) and of the SD in one organization. As far as their objectives are concerned they remain separated in the Amt, as for instance all the personnel problems of the SD (Amt II, VI and VII) were handled in Referat I A 4 by men of the SD, of the former SD-Main Office, that means employees of the Party. They are exclusively concerned with SD,

that is Party personal data, which have nothing to do with the problems concerning civil servants (Stapo and Kripe).

It is the same in AMT II. The administration of the budget funds is handled completely separately in Amt II. And this by necessity, for the administration has to concern itself with; [sic]

A. The budget funds of the State (Stapo and Kripe)

B. The budget funds of the Party (SD).
Here completely different directives are followed, for not only the salaries and wages were entirely different, but so were also the whole of the accounting system of the Party and of the state.

As concerns the personnel and the organization and the scope of its tasks, AMT III was a hundred percent identical with the former Zentralabteilung II/2 (Lebensgebiete) of the SD-Main Office. Therefore, it is exclusively a Party office, its men are employees of the Party, they receive Party wages, have no civil service rights and duties, are exclusively subordinate to Party orders, and for this reason only they cannot have any State executive powers. If individual men, as will be commented on later, were detached for executive tasks, then they were used as individual persons. They worked by order of the State (Stapo and Kripe) and not as SD and in pursuance of its tasks: to be the Party news service without any executive functions.

AMT IV takes over the tasks of the Secret State Police. Therefore, its special tasks are exclusively these of the State Police as an ex-ecutive [sic] agency of the State. One might say that Amt IV is identical with the Secret State Police Office.

AMT V takes over the tasks of the Criminal Police, that is of the Reich Criminal Office, which is also a purely State executive organism.

AMT VI (Foreign News Service) takes over the tasks of the former Zentralabteilung III/2 (Foreign News Service) therefore it is also a mere SD (Party) office, its members are Party employees and do not possess any executive powers.

AMT VII (Scientific Research) is also a mere SD (Party) office with-out [sic] any executive powers and without any regional agencies. It did not have any real predecessor in the SD-Main Office. Its task is phil-osophical [sic] historicalscientific [sic] research in the sphere of "Weltanschaung" which is laid down in a series of publications. This task too, did no longer exist during the war, so that it really only constituted a library and archives office.

It results from this survey that the effect of this reorganization was a clear and unequivocal separation of mere news service tasks (Amt II, VI and VII) on the one hand, and of the State Executive (Amt IV and V), so that at the beginning of the war there is no longer any overlapping of competencies.

So much more incomprehensible is the decision of the Nuernberg [sic] Verdict that the SD after 1939 were an auxiliary organization of the government's Executive Branch. The only factors which these different offices had in common with each other were three:

A. The same uniform.

B. The same chief (HIMMLER AND HEYDRICH).

C. The merely technical junction effected by the organizational structure of the RSHAL [sic], which, however, only exists in the main office, because regionally, the Stapo offices, themselves entirely self-contained and independent from each other on the one end, on the other hand the SD sections continued to exist. The Security Police Inspectorates and the SD Inspectorates are offices with no executive duties but only with supervising and organizational tasks without any departmental competence and power of command. The Stapo office received its directives for its work exclusively from Amt. IV of RSHA.

THE PRESIDENT: Dr. Aschenauer, I think this might be a convenient time to take the morning recess. Before we actually recess, let me indicate to the defense counsel the Mr. Wartenberg, the interrogator,

who took most of the statements of the defendants, will be available this afternoon for cross-examination on the part of defense counsel with regard to the manner of taking of the statements. Of course, this is an opportunity which you may avail yourselves of, if you desire. You don't need to cross-examine if you have nothing to examine him about, but in view of the fact that Mr. Wartenberg will ver [sic] soon be departing for the United States, it is necessary if you intend to raise any questions at all about the manner in which the statements were taken, that you raise these questions now, so this afternoon when we reconvene after the noon recess, Mr [sic] Wartenberg will take the stand, and he will be available to all defense counsel for any questions which they desire to put to him. We will now recess for fifteen minutes.

(recess)

THE MARSHAL: Take your seats, please.

The tribunal is again in session.

DR. ASCHENAUER: In the occupied territories, however, the merely technical junction was created in a manner corresponding to the RSHA. Consequently there exists at the headquarters of the Regional Commander of the Chief of the Security Police and the SD, the offices I-VI corresponding to those of the RSHA, and that is one of the reasons which have led to misconceptions concerning the SD. But here too nothing has changed in regard to the departmental duties of the various offices. It has to be added that office VII had branch offices neither in occupied territories nor within the Reich. And not in all occupied territories did Amt III have branch offices in operation.

The Einsatz groups and Einsatz commandos in the East were entirely differently organized. The usual organizational structure of the Security Police and SDC cannot be compared with them. They are not government offices which constitute branch agencies for offices III, IV, V, and VI, but militant units whose organizational structure is evolved out of their special task, which they are to execute within the executive powers of the commander-in-chief of Army groups and armies.

Their members are ordered into these militant units, their men are on operational duties and subject to military law.

They are composed of men from the Waffen-SS, the regular Police Force, the Stapo, the Kripo (Criminal Investigation Police), the SD, of emergency inductees and volunteers from conquered territories. They are organized for the commissioner of the Chief of the Security Police and the SD at the headquarters of the officer commanding the organizations behind the lines. Their activities change with the requirements of the situation in the zone of operations and are, as a rule, therefore, not those of Offices I, II, III, IV, V, or VI.

All these problems will be clarified by hearing Dr. Spengler as witness. These problems form the basis for the question: What was Ohlendorf's position to Himmler and Heydrich the leaders of the SS? During the presentation of evidence, it will be revealed that Ohlendorfs work was in direct

contrast to that of Himmler, Bormann and Ley.

Ohlendorf caused the following:

In the legal field reports were drawn up from a multitude of evi-dence [sic] pointing out, for example that "the small fry gets caught, but the big fish get away," and, incidentally, attention was called to the interference of the Party into judicial matters. A further report cri-ticized [sic] the overlapping of the system of fines which the economic as-sociations [sic] Wintochaftsverbaende could impose and the procedure before the regular criminal courts, which had caused an intolerable discre-pancy [sic] in the severity of penalties inflicted.

Reports concerning the educational field brought the result that further attacks on schools and school teachers were prohibited by Goeb-bels [sic], that the importance of scientists was officially adknowledged [sic], that interference with school life by the H.J. as [sic] discontinued, the H.J. activities reduced, the school children excused from collections of all kinds, etc.

The SD reports submitted again and again evidence for the importance of motion pictures and succeeded in supporting the role of the motion pictures against the will of Goebbles. The seventh Kulturkammer which already had been proclaimed by Ley was stopped by appropriate SD reports. In contradiction to the political policy of coordination (Gleichschaltung), private association [sic] were sponsored. In long reports, Amman's publishing and press policies were criticized and thus a number of publishing firms and newspapers were saved from closing down or from being transferred to the Eher Publishing firm.

Equally, the SD reports achieved a nearly complete reduction of political publications. On the other hand, the publication of good clas-sical [sic] novels and worthwhile new novels was aided.

Only thanks to the SD reports, the closing of universities was ex-cluded [sic] from the measures for waging total war, although a decision to that effect had already been reached. The evidence presented was so

convincing that the Party Chancellery changed their opinion and, satis-fied [sic] by the documentary and statistical evidence, brought forth by the SD exerted its influence for the continuation of work at the univeri-ties [sic].

The SD fought against all tendencies of the DAF towards collectivi-zation [sic] with reports supported by evidence.

Critical conditions within the Party were reported for at least five Gaues.

These facts correspond to the description of the "SD" in the "C.I. Handbook Germany," published by the "Supreme Headquarters, Allied Expeditionary Forces, office of Assistant Chief of Staff, G-2, Counter Intelligence Sub-division." It reads here under number IV, "The German Intelligence Service," as follows:

"Amt III, with its regional offices, is the Party Intelligence Ser-vice [sic] inside Germany. To this end, it maintains networks of agents in all walks of German life.... who are drawn from all classes and professions. The information supplied by these agents is made up into Lageberichte (Situation reports) which are sent up to RSHA by the regional offices. These reports are extremely frank, and contain a complete and unbiased picture of German opinion and morale."

These are only brief indications for the presentation of evidence of Ohlendorf. The picture of a man will arise which, in purpose, intent and actual work stood in opposition to the terrible events in the East.

Ohlendorf, who had been a compulsory member of the Security Ser-vice [sic] since 1938, gets into the terrible situation, the effects of which are visible today, through the announcement of the mobilization. Before his assignment in Russia, he had a war assignment of the Reich Group Commerce. After he had refused twice this war assignment was cancelled upon order from Heydrich. Ohlendorf was drafted for the Reich Fuehrer SS. This fact is also proven by the Indictment, No. 3196, page 5 of the ori-ginal [sic]. Ohlendorf now clearly belonged to a military, hierarchic organiza-

tion.

Ohlendorf did not agree with the execution order. The assembled leaders of the Einsatzgruppen protested unanimously against Strecken-bach [sic] who announced the Fuehrer order in the name of Himmler and Hey-drich [sic]. Streckenbach agreed with the opinion expressed through that protest, but he declared that in a similar cases [sic] in Poland he had already tried everything in order to have the order not executed.

Himmler supposedly refused flatly. At the beginning of October 1941, Ohlendorf approached Himmler at Nicolajew, with regard to the execu-tion [sic] order, although the latter in a speech before the leaders and men of the Einsatzgruppe and of the Einsatzkommandos called together, had again repeated the strict order of the Fuehrer. Ohlendorf in speaking to the Reich Fuehrer SS emphasized the inhuman burden. He did not even receive an answer. He could not make Himmler revoke the order. There was no possibility for him to prevent the practical execution of the order, which was his endeavor. There is no possibility for him to evade the order. He is in an unheard-of conflict of duties. Ohlendorf has no possibility to make any appeal, since any attempt to get to Hitler personally always had to be made via Heydrich and Himmler, [sic] Since it is Bormann who is behind the order, any attempt to surpass Himmler and Heydrich would have failed at the latest when it got to Bormann. Bor-mann's [sic] actual role in that unequaled European tragedy, the story of who he was, will be recorded by some future historian. If one assumed any other possibilities for Ohlendorf to gain influence, one would forget, that he was only a Standartenfuehrer, without any political powers, i.e. without any position in the Party based on political powers. He knows neither Hitler nor Bormann. No Reichsleiter or Gauleiter or any other politically influential personalities are his acquaintances, let alone on his side. All he could do was to interpret the order in as limited a way as he could possibly do and to try to execute it as humanely as possible under the given circumstances, contrary to the interpretation

of the indictment not only in the interest of his men but first of all in the interest of the victims, since the protection of the men against brutalization is a protection of the victims against bruta-lized [sic] men. Ohlendorf's entire life shows that in spite of all set-backs [sic] and threats his fight was not only directed against the tyranny of Nazi leaders within the Reich, but that immediately after his re-turn [sic] from the Einsatz he starts fighting against the exponents of extermination and colonial power politics in the East, especially against Koch, Globitschnik and Einsatzgruppenfuehrer, SS-Gruppenfuehrer Thomas. Ohlendorf continues in this fight, even though Himmler treatens [sic] him not only with liquidation of his office in case he should continue with this kind of reporting, but also threatens to arrest him. In that moment it becomes evident that, as soon as there is no purely military relationship where no resistance is possible, Ohlendorf makes use of the slightest opportunity in order to actively intervene against the policies of power and extermination.

This is the picture that will result from the evidence as presented by the defense. The tragedy of Ohlendorf's life will become clear to every man.

Your Honor, I ask that the defendant Ohlendorf be excused from taking part in the session this afternoon and tomorrow morning.

THE PRESIDENT: In order that Dr. Aschenauer may have an opportunity to prepare the defense of the defendant Ohlendorf, Ohlendorf will be excused from attendance upon the trial for the rest of the day and for all of tomorrow.

DR. ASCHENAUER: Thank you.

THE PRESIDENT: Your're [sic] very welcome.

DR. SCHWARZ: (Attorney for the Defendant Joost [sic])

Your Honors, gentlemen –

THE PRESIDENT (Interposing): Just before you begin, I presume you would want to leave, Dr. Aschenauer; you would like to leave the

Court now and you would like to have the defendant Ohlendorf available from this moment?

DR. ASCHENAUER: Yes, Your Honor.

THE PRESIDENT: Will the defendant Ohlendorf be escorted from the courtroom so that he will be available to his counsel. Just a moment please, Dr. Schwarz.

Dr. Aschenauer, may I suggest to you that if you wish to put any questions to the interrogator, Mr. Wartenburg [sic], that Mr. Wartenburg [sic] will be available this afternoon; and, any time you care to come in, we will make him available to you so that you may not lose any time in getting back to your client.

DR. ASCHENAUER: I have no questions to address to Mr. Wartenburg [sic].

THE PRESIDENT: Very well, Dr. Schwarz, you may proceed.

DR. SCHWARZ: If court please –

- A –

The Prosecution charges that Heinz Jost, as head of the Einsatzgruppe A and in violation of the provisions of Law No. 10 of the Allied Con-trol [sic] Council of 20 December 1945, committed the following:

1. Crimes against humanity by participating in the murder of more than one million human beings, being a party to tortures, cruelties and inhuman acts,

2. War crimes by atrocities or assault on body, life or property under violation of the rules and regulations of warfare, and

3. With having been a member after 1 September 1939 of an organ-ization [sic] which was declared criminal by the International Mi-litary [sic] Tribunal and by par. 1, Article II of the Law No. 10 of the Control Council, namely the SS and the SD.

- B –

By means of witnesses and documents, the Defense will attempt to prove the following points in answer to the charge of having committed